IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ———.

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. W. UNDERWOOD, ED. MICHALOWSKI, *Petitioners*,

v.

HAROLD L. ICKES, Secretary of the Interior, *Respondent*.

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The opinions of the courts below have not been reported. On October 23, 1941, the District Court filed a memorandum, which reads in full as follows:

> On the admitted facts and the law in the case, the decision of the defendant shows prejudice and abuse of judicial discretion. Motion to dismiss filed by defendant on October 25, 1940, is overruled.

The opinion of the Court of Appeals was filed on March 20, 1944.

BASIS OF JURISDICTION.

The statute under which jurisdiction of this Court is invoked is section 240 (a) of the Judicial Code (28 C. A., sec. 347 (a)).

STATEMENT OF THE CASE.

A statement of the case is set forth in the preceding petition, p. 2.

QUESTIONS PRESENTED.

1. Whether it was arbitrary, capricious and lawful for the Secretary to deny the claim to public land solely on suspicion of a fraudulent purpose on the part of the claimants, which fraudulent purpose he found was actually disproved by evidence before him.

2. Whether it was arbitrary, capricious and lawful for the Secretary, because of such suspicion, to increase the burden of proof with regard to the subject of value, and to deny the claim because the claimants had not sustained the increased burden.

ARGUMENT.

The Decision of the Court of Appeals, in the Light of the Facts to Which it is Applied, is in Conflict With Decisions of this Court, and is Based Upon a Principle Which Would Revolutionize the Public Land Laws and Enable the Secretary of the Interior to Dispense the Public Lands as He Sees Fit.

The ultimate question for decision by the Secretary in the proceedings before him, was whether the location made by petitioners was a valuable mineral deposit. The controlling rule of law with regard to that question which the Secretary was required to apply in the administration of the public land laws, was whether a person of ordinary prudence would be justified in the further expenditure of

his labor and means, with a reasonable prospect of success, in developing a mineral deposit.

The rule was laid down in the leading case of *Chrisman* v. *Miller*, 197 U. S. 313, as follows:

> By the Land Department this rule has been laid down (*Castle* v. *Womble*, 19 Land Dec. 455, 457):
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> "Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' "

The inquiry with regard to value was pursued under five headings, set up as charges against petitioners, as follows: (1) the claim was located for purposes other than mining, (2) the claim was located for speculative purposes, (3) the claimants had not performed the amount of discovery work required by law, (4) mineral had not been found on the land in sufficient quantities to constitute a valid discovery, and (5) the land was non-mineral in character.

All of these charges were finally found in favor of petitioners. The claim was disallowed, however, because of a suspicion of fraud and by applying a supposed rule of evidence, arising upon that suspicion and which increased and made more onerous the burden of proof on petitioners with regard to value.

In the final decision against petitioners, of August 11, 1939, the Under Secretary said:

> While there is no positive evidence in the record either that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government, nevertheless the case is not

> free from the suspicion by reason of the selection of the site for location that the possibility of appropriation thereof by the Government might have been contemplated by the parties, and this possibility was a material inducement for the location. In these circumstances it was all the more incumbent on the claimants, in order to secure a reversal of the previous judgments, to establish with reasonable certainty that the sand and gravel on the claim were commercially valuable. It is the opinion of the Department that in the decisions below there was material error in the estimation and appreciation of the evidence . . . (R. 116)

Petitioner sought a rehearing on the ground that the suspicion and this rule of evidence amounted to prejudicial error. The decision was upheld, however, and the rule even more strongly stated as follows:

> I cannot agree that these remarks as to the burden of proof amount to prejudicial error. It is a settled rule in this Department that where land has a present or potential value for purposes other than mineral, that fact must be taken into consideration in determining the character of the land. Under such circumstances the evidence of mineral value, in order to sustain the validity of the claim, must be *more clear and convincing* than in cases where there is no conflict with other present or potential values. (R. 121.)

In all cases of a location on public lands, the two possibilities which constituted the basis for this suspicion exist. If the Secretary may base suspicion upon that foundation, and on top of that suspicion superimpose an additional requirement of proof, he may thus place an insuperable obstacle in the way of any claimant, and so fundamentally revolutionize the administration of the public land laws as to enable himself to give or withhold the public lands according to his own personal unlimited will.

As stated in the brief for the Secretary in the Court of Appeals, the claim "was held invalid *only* because appellees did not sustain their burden of proof".

In the proceedings against petitioners, the Secretary was exercising a judicial function, and, therefore, was required to act judicially. The decision of the Court of Appeals sustaining his action in this case is in conflict with rules laid down by this Court in many cases, including the following:

> *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316:
>
> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands.

A judicial function must be exercised consistently with those fundamental requirements of fairness which are of the essence of proceedings of a judicial nature.

> *Morgan* v. *United States*, 298 U. S. 468; 304 U. S. 1.

The judicial function excludes unlimited or arbitrary power. It excludes any power to enlarge or curtail the rights of parties. It excludes any power to substitute the will of the judicial officer for the will of Congress, as manifested in the statutes.

> *West* v. *Standard Oil Co.*, 278 U. S. 200.
> *Payne* v. *Central Pac. R. Co.*, 255 U. S. 228.
> *Daniels* v. *Wagner*, 237 U. S. 547.

Any attempt by an official having a judicial function to deprive parties of rights, may be corrected by the courts.

> *Cornelius* v. *Kessel*, 128 U. S. 456.

West v. *Standard Oil Co.*, 278 U. S. 200 (reversing 57 App. D. C. 329, 23 Fed. (2d) 750), holding that the Secretary of the Interior has no authority to make grants of public lands on facts outside the scope of the statute.

Daniels v. *Wagner*, 237 U. S. 547 (1915), in which this Court condemned a conception of "discretionary" authority like that revealed in the decision made in the Interior

Department in this case, and approved by the Court of Appeals.

The decision of the Court of Appeals is in conflict with decisions of this Court to the effect that courts and quasi-judicial officers may not lawfully defeat rights of parties, upon suspicion (especially as proof of fraud), or upon facts and circumstances not shown by the evidence, or upon rumor, surmise or remote hearsay. "Suspicion may deserve great attention", said Chief Justice Marshall, but "the ministers of justice ought not officially to entertain it." (Burr's Trials, Vol. 1, pp. 16-17.)

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 230.
Morgan v. *United States*, 304 U. S. 1, 19-20.
Morgan v. *United States*, 298 U. S. 468, 480-481.
Ubarri v. *Laborde*, 214 U. S. 168.
Clark v. *Reeder*, 158 U. S. 505, 523, 524.
United States v. *Hancock*, 133 U. S. 193.
United States v. *Maxwell Land-Grant Co.*, 121 U. S. 325.

The decision of the Court of Appeals is in conflict with decisions of this Court to the effect that the Secretary, in the administration of the public land laws, is executing not his own will, but that of Congress, and that he is not an agent to give or withhold the public lands on any theory of personal or unlimited "discretion", or, as is indicated in the opinion of the Court of Appeals, that as to the public lands he constitutes the Government and may dispense its bounty as he sees fit.

West v. *Standard Oil Co.*, 278 U. S. 200.
Daniels v. *Wagner*, 237 U. S. 547.

Respectfully submitted,

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